(3)

No. 99-1261

Supreme Court, U.S.
FILED
MAR 8 - 2000
CLERK

IN THE

Supreme Court of the United States

MICCOSUKEE CORPORATION,

Petitioner,

v.

BRUCE BABBITT, SECRETARY OF THE INTERIOR,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

REPLY TO BRIEF IN OPPOSITION

Of Counsel:
HOBBS, STRAUS, DEAN & WALKER, LLP
S. BOBO DEAN
JOSEPH H. WEBSTER
WILLIAM R. NORMAN, JR.

MARSHA KOSTURA SCHMIDT
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282
Attorney of Record for Petitioner Miccosukee Corporation

May 8, 2000

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

11 pp

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

1. The ISDEAA Requires the Secretary of the Interior to Contractually Obligate the United States to Reimburse Tribal Contractors for Their Necessary Contract Support Costs 2

2. The Federal Circuit's Interpretation of the Proviso in Section 450j-1(b) Is Inconsistent with the Overall Function of the ISDEAA..... 5

CONCLUSION 7

TABLE OF AUTHORITIES

CASES Page

Cherokee Nation of Oklahoma v. Shalala, Civ. No.99-092-S (E.D. Okla.,filed Mar. 5, 1999) 1

New York Airways v. United States, 369 F.2d 743 (Ct. Cl. 1966) 4

Ramah Navajo Chapter v. Babbitt, Civ. No. 90-0957 LH/WWD (D.N.M.,complaint in intervention filed Oct. 8, 1999) 1

Ramah Navajo Sch. Bd. v. Babbitt, 87 F.3d 1338 (D.C. Cir. 1996) 5

STATUTES

Indian Self-Determination and Education Assistance Act ("ISDEAA"), Public Law 93-638 (as amended), codified at 25 U.S.C. §§ 450 et *seq.* .....*passim*

25 U.S.C. § 450a 6

25 U.S.C. § 450j-1(a) 3

25 U.S.C. §§ 450j-1(a)(2)-(3) 3, 4, 6

25 U.S.C. § 450j-1(b) 2, 3

25 U.S.C. § 450j-1(f) 3

MISCELLANEOUS

134 Cong. Rec. H7366-04, 1988 WL 175429 (Sept. 9, 1988) 6

REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The Government's Opposition Brief fails to acknowledge or reconcile the dramatic and disruptive change to the Federal Government's policy of Indian self-determination caused by the Federal Circuit's narrow interpretation of tribal contractor rights under the Indian Self-Determination and Education Assistance Act ("ISDEAA"), Public Law 93-638 (as amended), codified at 25 U.S.C. §§ 450 *et seq.* In effect, the Federal Circuit's decision transforms the ISDEAA from a vehicle for tribal self-determination to a mechanism for the United States to shift the costs of providing federal program services to the very tribes that the Act was designed to benefit.

Resolution of this case turns on whether the ISDEAA limits the Secretary of the Interior's authority to contractually obligate the United States to reimburse these contract support costs (as held by the Federal Circuit), or whether the Act merely limits the Secretary's authority to disburse funds to fulfill that obligation (as held by the Interior Board of Contract Appeals). Despite the importance of this question to the future of Federal Indian policy[1], the Government's Opposition Brief pays short shrift to the critical distinction between contracting and payment authority. Instead, the Government asserts, in an

---

[1] So important is this question that it is also the subject of two separate class action lawsuits both pending before district courts in the Tenth Circuit. *See Cherokee Nation of Oklahoma v. Shalala*, Civ. No. 99-092-S (E.D. Okla., filed Mar. 5, 1999) (involving Indian Health Service programs), and *Ramah Navajo Chapter v. Babbitt*, Civ. No. 90-0957 LH/WWD (D.N.M., complaint in intervention filed Oct. 8, 1999) (involving Bureau of Indian Affairs programs).

almost cursory manner, (1) that 25 U.S.C. § 450j-1(b) is "clear and unambiguous" in limiting the right of tribal contractors to obtain reimbursement for their required contract support costs, and (2) that this interpretation is "consistent with the over-all function of the ISDA." Gov't Opposition at 8-9. Both of these assertions are wrong and reflect a fundamental misunderstanding of the purpose and function of both contract support and the ISDEAA.

1. The ISDEAA Requires the Secretary of the Interior to Contractually Obligate the United States to Reimburse Tribal Contractors for Their Necessary Contract Support Costs.

The Government claims that the proviso in § 450j-1(b)[2] is "unambiguous" that tribal contractors are not entitled to reimbursement for their contractually agreed amount of contract support costs if Congress fails to appropriate adequate funds. Gov't Opposition at 8.[3] However, in referring to the plain language of the proviso, the Government is forced to gloss over the distinction between contracting and payment authority. Thus, the Government asserts that the proviso "on its face places limitations on the

---

[2] The Government quotes the title of § 450j-1(b) ("Reductions and increases in amount of funds provided") to suggest that the purpose of the entire section is to condition funding for tribal contractors. Gov't Opposition at 8-9. In fact, the larger purpose of this section is to prevent the Secretary from forcing tribal contractors to bear the brunt of congressional budget cuts in order to preserve the federal bureaucracy. As explained below, the Federal Circuit's interpretation of the proviso is inconsistent with this primary goal of protecting funding for tribal contractors.

[3] The fact that the IBCA interpreted the proviso in the manner urged by Miccosukee weighs against the Government's position that the language is unambiguous.

payments to Tribes authorized by Section 450j-1(a)." Gov't Opposition at 10-11 (emphasis added). Similarly, the Government urges that § 450j-1(b) "is most logically read as providing the conditions under which the *Secretary may pay* less (or more) than the amount otherwise provided by Section 450j-1(a)." Gov't Opposition at 9 (emphasis added).

The Government's characterization of the proviso in § 450j-1(b) as "most logically" a limitation on the *Secretary's ability to make payments* to tribal contractors is, in fact, correct and thus fails to support the Government's argument that the Secretary's contracting authority is restricted. On its face the limitation in the proviso *only* applies to the Secretary's ability to "provide funds;" it says nothing about the Secretary's contracting authority.[4] In contrast, 25 U.S.C. § 450j-1(f) is absolutely clear that the Secretary is both authorized and required to obligate the United States to reimburse tribal contractors for the full amount of their required contract support costs: "the Secretary *shall add to the contract* the *full amount of funds* to which the contractor is entitled under subsection (a)...." (emphasis added); *see also* 25 U.S.C. §§ 450j-1(a)(2)-(3). To claim that the proviso, despite plain language to the contrary, is an "unambiguous" limitation on the Secretary's contracting authority is simply absurd.

---

[4] The Government attaches great weight to fact that Miccosukee's contract incorporated the proviso in § 450j-1(b). Gov't Opposition at 11. This is a curious position for the Government to take, since the *meaning* of the proviso is the source of the dispute in the instant case. Miccosukee's position is that the incorporation of the proviso is simply an acknowledgement that the *Secretary can pay* no more than is appropriated. Nowhere does the contract state that the Tribe is prohibited from recovery through a judgment.

In fact, the ISDEAA is legally indistinguishable from the statute at issue in *New York Airways*, 369 F.2d 743 (Ct. Cl. 1966), where the court held that the contractor could recover unpaid amounts under a negotiated rate agreement through a judgment, despite the failure of Congress to appropriate adequate funds. The Government attempts to distinguish *New York Airways* by claiming that "neither the statute authorizing the contract nor the contract itself limited the government's obligation to pay based on the availability (or unavailability) of appropriations." Gov't Opposition at 14. This claim is simply not true. In fact, the statute at issue in *New York Airways* involved a very similar limitation on the agency's ability to pay these obligations, providing that payments were restricted to specific "appropriations made to the Board for that purpose." 369 F.2d at 745 (quoting 49 U.S.C. § 1376(c)). Thus, as in the instant case, the agency's ability to make payments to satisfy its contractual obligations was expressly limited to available appropriations.

The critical point in *New York Airways* was that the agency had the authority to enter into contracts independent of the limitation on its payment authority. As explained by the court, "Congress would have been required to incorporate into section 406 of the Act [the Board's rate-making authority] ... suitable terminology restricting the Board's authority to set rates under section 406 beyond available appropriations." *Id.* at 749. Since Congress failed to do so, New York Airways was entitled to a judgment to enforce its contract. In the instant case, the availability of appropriations is similarly not listed as a factor to be considered in determining the amount of contract support that shall be added to the contract. *See* 25 U.S.C. §§ 450j-1(a)(2) -(3). Thus, as in *New York Airways*, Miccosukee is entitled to collect the amount specified in its contract through a judgment.

Finally, the Government claims that the District of Columbia Circuit's decision in *Ramah Navajo Sch. Bd. v. Babbitt*, 87 F.3d 1338 (D.C. Cir. 1996), is inconsistent with a right to recover unpaid contract support through a judgment since the court suggested that the BIA could allocate contract support funds on a *pro rata* basis. Gov't Opposition at 12-13. However, the School Board did not seek full funding of contract support in that case. Rather, the School Board's challenge was to the BIA's practice of penalizing tribal contractors for submitting late documents by reducing their contract support funding, a practice the court found to be illegal under the ISDEAA. Thus, the court was only concerned with how the Secretary distributes those funds that are available and did not have occasion to reach the issue of whether a tribal contractor can recover any unpaid amount through a judgment. Certainly a holding that the BIA cannot exacerbate shortfalls through illegal penalties is not inconsistent with a right to full funding.

2. The Federal Circuit's Interpretation of the Proviso in Section 450j-1(b) is Inconsistent with the Overall Function of the ISDEAA.

According to the Government, the Federal Circuit's narrow interpretation of the rights of tribal contractors under the ISDEAA is "consistent with the over-all function of the ISDA." Gov't Opposition at 9. The Government bases this statement on its assumption that the proviso is merely placing a funding limitation on tribal contractors that "likewise applies to funding of programs administered by the Secretary." Gov't Opposition at 10. While it is true that the ISDEAA limits direct program funding to the amount that would have been available to the Secretary, this assumption is *absolutely wrong* as to contract support

and demonstrates a lack of understanding of the purpose of contract support under the ISDEAA.

By definition contract support is for necessary costs *not* incurred by the Secretary. Under the ISDEAA, contract support is provided for (1) required expenses imposed on tribal contractors but not incurred by the Secretary (such as audit costs), and (2) expenses paid by another part of the federal bureaucracy and thus not available as program funds (such as Justice Department legal support). 25 U.S.C. § 450j-1(a)(2). To the extent that a tribal contractor is not fully reimbursed for its required contract support costs, it often must divert already scarce program funds to pay these largely fixed costs. This reduces the level of program funds available to the tribal contractor to provide services to a level *below* the amount otherwise available to the Secretary. Contract support is intended to level the playing field so that tribes have the same resources available to operate programs as would otherwise be available to the Secretary. If tribes are not permitted to recover these costs, then they face a strong incentive not to contract programs under the ISDEAA, which is flatly contrary to congressional intent. 25 U.S.C. § 450a.

The Government also argues that reading the proviso only to limit the Secretary's payment authority makes the proviso "surplusage in contravention of a fundamental canon of statutory construction." Gov't Opposition at 11. First, Appellant's reading of the statute gives meaning to the proviso. Second, the legislative history indicates that Congress did not intend the proviso to have a significant impact on the ISDEAA. The proviso was added in the final House revision of the ISDEAA amendments, S. 1703, in what the House manager described as "mostly a technical rewrite" for which the "more important changes" would be noted. 134 Cong. Rec. H7366-04, 1988 WL 175429 (Sept. 9, 1988). There was no mention of the proviso at all, which

suggests that the proviso was not considered as a significant limitation on the other contract support language being adopted.

In contrast, the interpretation adopted by the Federal Circuit and urged by the Government would give the proviso paramount importance over the mandatory contract support funding language. In effect, the Federal Circuit's interpretation would break with nearly a quarter century of federal Indian policy and create an inequitable system under which the Secretary would be authorized to contractually agree to reimburse tribes a fixed amount of money in exchange for performing services on behalf of the federal government, but then allow the United States to escape any liability for not reimbursing tribes the agreed amount if Congress subsequently fails to appropriate enough funds. Surely, the Federal Circuit's expansive interpretation of the proviso does far more damage to the integrity of the ISDEAA and its stated goal of *encouraging* Indian self-determination than the limited interpretation found by the IBCA, which gives meaning to both the proviso and the mandatory contract support language.

CONCLUSION

The outcome of this case will directly impact the hundreds of tribes and tribal organizations throughout the United States that have contracts to provide services on behalf of the federal government under the ISDEAA. Specifically at stake are tens of millions of dollars annually, an enormous sum for these tribal contractors, which will determine the level of vital federal services such as health care and police protection provided to hundreds of thousands of individual Indian people. In a broader sense, the outcome of this case will determine nothing less than whether the ISDEAA is an honorable attempt by the

Federal government to promote tribal self-government for the betterment of Indian people or is yet another broken promise.

As a matter of law and of simple equity, Miccosukee's *certiorari* petition should be granted and the decision below reversed.

Respectfully submitted,

Of Counsel:
HOBBS, STRAUS, DEAN & WALKER, LLP
S. BOBO DEAN
JOSEPH H. WEBSTER
WILLIAM R. NORMAN, JR.

MARSHA KOSTURA SCHMIDT
HOBBS, STRAUS, DEAN & WALKER, LLP
2120 L Street, N.W., Suite 700
Washington, D.C. 20037
(202) 822-8282
Attorney of Record for Petitioner Miccosukee Corporation